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No. ___

In The

Supreme Court of the United States

October Term, 1987

JOHN L. KALTSAS, et al.,

Appellants,

v.

CITY OF NORTH CHICAGO, et al.,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE SECOND DISTRICT

JURISDICTIONAL STATEMENT

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May 3, 1988

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QUESTIONS PRESENTED

1. Does a state statute that grants residents of unincorporated areas with 2,500 or more residents the right to vote for village incorporation, but grants nearby municipalities the power to block such an election if the area to be incorporated has fewer than 7,500 residents, violate the Equal Protection Clause of the fourteenth amendment?

2. Does a state statute that grants residents of unincorporated areas with 2,500 or more residents the right to vote for village incorporation, but grants nearby municipalities the power to block such an election, violate the Due Process Clause of the fourteenth amendment?

3. Does a state statute that grants nearby municipalities the power to block a village incorporation election, but that provides no standards for municipalities to follow in determining whether to consent and gives the persons seeking to incorporate no opportunity to be heard on the issue of municipal consent, violate the Due Process Clause of the fourteenth amendment?

LIST OF PARTIES

The parties to this appeal are listed as follows:

John L. Kaltsas, Fred Engbrecht, Diana Engbrecht, Bruce L. Felknor, Edith J. Felknor, James E. Ward, Donna R. Ward, Kevin Calahan and Gabrielle Calahan, Appellants.

City of North Chicago, City of Lake Forest, City of Waukegan, Village of Lake Bluff, Village of Green Oaks, Village of Mettawa and Village of Libertyville, Appellees.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported at 160 Ill. App. 3d 302, 513 N.E.2d 438 (1987). A copy of the opinion is attached as Appendix A.

The denial of Appellants' Petition for Leave to Appeal by the Illinois Supreme Court is reported at 118 Ill. 2d 545, 520 N.E.2d 386 (1988). A copy of the Order Denying Appeal, entered on February 3, 1988, is included as Appendix E.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

On June 5, 1986, the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois dismissed the complaint on the grounds that the complaint failed to state a cause of action, and appeal was taken to the Appellate Court of Illinois for the Second District. (App. D) On August 12, 1987, the Appellate Court entered its opinion, affirming the judgment of the Circuit Court of Lake County. (App. A) A Petition for Rehearing Or, In The Alternative, For Certificate of Importance was timely filed with the Appellate Court for the Second District on September 2, 1987, and was denied on October 7, 1987. (App. B)

On November 12, 1987, Appellants filed a Petition for Appeal as a Matter of Right, and in the Alternative, for Leave to Appeal with the Supreme Court of Illinois, which was denied on February 3, 1988. (App. E) Because the Illinois Supreme Court denied review of this cause, the decision of the Appellate Court of Illinois constitutes a final judgment or decree rendered by the highest court of the State of Illinois. *See, e.g., American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976).

This appeal is being docketed in this Court within 90 days from the denial of the Petition for Appeal as a Matter of Right, and in the Alternative, for Leave to Appeal (App. E), and is timely filed. *See e.g., American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). An order was entered on February 29, 1988, by the Illinois Supreme Court which stayed the issuance of a mandate pending the filing of a notice of appeal to the United States Supreme Court. (App. F) The notice of appeal to the United States Supreme Court was filed on April 26, 1988. (App. G) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) because the constitutional validity of a state statute was challenged and the statute was upheld.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION 1. . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The pertinent Illinois Statutes are set forth in Appendix H.

RAISING THE FEDERAL QUESTION

In the complaint initiating this action, Appellants raised the claim that the municipal consent provision in section 2-3-5a of the Illinois Municipal Code is unconstitional in that it deprives Appellants of their right to vote and violates the Equal Protection and the Due Process Clauses of the fourteenth amendment of the United States Constitution and 42 U.S.C. § 1983. As the Illinois Appellate Court's opinion noted, the Complaint was dismissed by the Circuit Court of Lake County, Illinois for failure to state a cause of action.

The voting rights and constitutional claims were reiterated by Appellants on appeal before the Illinois Appellate Court for the Second District. The appellate court affirmed the circuit court's dismissal of the complaint, finding that there was no right to an elective

franchise involved and therefore that there had been no violation of equal protection and due process rights.

Appellants petitioned the Illinois Supreme Court for appeal as a matter of right and, in the alternative, for leave to appeal. The petition was denied, resulting in the present appeal to this Court.

STATEMENT OF THE CASE

On November 18, 1985, six of the nine Appellants in this case and 370 other petitioners filed a petition to form a new village, known as Forest Knoll, with the Circuit Court of Lake County, Illinois, pursuant to Section 2-3-5a of the Illinois Municipal Code. Ill. Rev. Stat. ch. 24, ¶ 2-3-5a (1985). Final action on incorporation petitions filed under Section 2-3-5a is taken by the voters in the proposed village at an election held pursuant to Section 2-3-6 of the Code. Ill. Rev. Stat. ch. 24, ¶ 2-3-6 (1985). Because the area of Forest Knoll contained at least 2,500 but fewer than 7,500 residents, Section 2-3-5a required the petitioners to obtain the consent of all existing municipalities within 1½ miles of the proposed village before the area could be incorporated; such consent is not required in areas with a population of 7,500 or more. Only one of the eight municipalities within 1½ miles consented, and the others, who area the Appellees here, refused to consent. In fact, a number of them filed objections to the proposed incorporation with the circuit court. On January 2, 1986, the circuit court dismissed the petition on the motions of the objectors, and the petitioners appealed.

On April 2, 1986, while that appeal was pending, the Appellants filed the present action against the Appellees, challenging the constitutionality of the municipal consent provision of Section 2-3-5a on grounds that it deprives them of their fundamental right to vote and violates their rights to equal protection and substantive and procedural due process which are protected by the Fourteenth Amendment of the

United States Constitution. Appellees filed motions to dismiss, asserting that the complaint failed to state a cause of action because the state has plenary power in dealing with municipal boundaries and therefore no constitutional challenges may be made against Section 2-3-5a. On June 5, 1986, the Circuit Court of Lake County granted the motions and dismissed the complaint with prejudice. Appellants filed a timely appeal of the court's dismissal order.

On October 10, 1986, while the appeal of the dismissal of the complaint was pending, the Illinois Appellate Court for the Second District vacated the circuit court's order regarding the petition to incorporate on grounds that the dismissal was premature; it remanded the matter with instructions that the circuit court comply with a preliminary procedural requirement. *In the Matter of a Petition to Call an Election on the Question of Incorporating the Village of Forest Knoll*, 148 Ill. App. 3d 436, 499 N.E.2d 129 (2d Dist. 1986). On February 20, 1987, the circuit court, hearing the matter on remand, again dismissed the petition to incorporate. The petitioners again appealed on procedural grounds.

On August 12, 1987, while the appeal of the second dismissal of the petition was pending, the appellate court issued the opinion and decision that is the subject of the present appeal. The appellate court upheld the circuit court's dismissal of the complaint. *Kaltsas v. City of North Chicago*, 160 Ill. App. 3d 302, 513 N.E.2d 438 (2d Dist. 1987). According to the court, "the pivotal question to be answered is whether the issue in this case is one of voting rights as urged by the plaintiffs or municipal boundaries as suggested by the defendants." 513 N.E.2d at 441. The court concluded that there had been no infringement of the fundamental right to vote because questions regarding municipal corporations and boundaries are not debatable under the United States Constitution; it implied that there is only one exception to this rule, which applies when there is discrimination against a "certain class" of voters, presumably on the basis of race. Accordingly, it found that

there had been no violation of Appellants' equal protection or due process rights. Appellants petitioned the Illinois Supreme Court for appeal as a matter of right and, in the alternative, for leave to appeal. On February 3, 1988, the court denied the petition. (App. B)

In the meantime, on December 31, 1987, the appellate court vacated on technical grounds the circuit court's second dismissal of the petition to incorporate. *In re Petition to Call An Election On the Question of Incorporating the Village of Forest Knoll*, 164 Ill. App. 3d 392, 517 N.E.2d 1188 (2d Dist. 1987). The petition has been remanded to the circuit court where the petitioners await the outcome of the present appeal.

THE QUESTIONS ARE SUBSTANTIAL

The constitutional question in this case involves the impairment of the right to vote which is our most fundamental right. Because the right to vote is preservative of all of our other rights, *Reynolds v. Sims*, 377 U.S. 533, 562-63, (1964), the question involved in this case is substantial for that reason alone. The statute at issue treats similarly situated voters differently and gives municipalities the authority to veto an election for the incorporation of a new village, resulting in a violation of Appellants' rights to equal protection and substantive due process. In addition, the statute also violates Appellants' right to procedural due process because the veto power is given to existing municipalities without any standards and may be summarily exercised without a hearing.

There is also a substantial question because the decision of the court below conflicts with the decisions of the courts of several other states in cases involving similar facts and the same provisions of the United States Constitution. Indeed, the appellate court below admits that its decision is contrary to the opinions in *Mid-County Future Alternatives Committee v. Metropolitan Area Local Government Committee*, 82 Or. App.

193, 728 P.2d 63, *modified*, 83 Or. App. 533, 733 P.2d 451 (1987), and *City of Seattle v. State of Washington*, 103 Wash. 2d 663, 694 P.2d 641 (1985), where the statutes reviewed were essentially the same as Section 2-3-5a and were invalidated because they infringed on the right to vote. 513 N.E.2d at 442. Due to the fact that the fundamental voting right is involved and the decision of the court below conflicts with other applicable authority interpreting the Equal Protection Clause, a substantial question exists meriting appeal to this Court.

I.

THE OPINION BELOW

The error of the appellate court below is apparent from its statement that "[t]he pivotal question to be answered is whether the issue in this case is one of voting rights as urged by the plaintiffs or municipal boundaries as suggested by the defendants". 513 N.E.2d at 441. The court's decision was based on an unduly expansive reading of the language of *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177-79 (1907), which admittedly stands for the proposition that the state has broad discretion over municipal boundaries. The appellate court stated that the instant case involves "the location of a new municipality, the control of which is firmly within the hands of the legislature", and accordingly held that there had been no infringement of a fundamental right. 513 N.E.2d at 442.

In the mind of the court below, the only exception to this broad authority would be cases involving the gerrymandering of political districts so as to discriminate against a "certain class" of voters, presumably on the basis of race.[1] However, as the following discussion

1. Given the court's opinion and the authority relied on, Appellants assume that the court below would only

(Continued on following page)

shows, the court below ignored numerous decisions of this Court and others, including those in *City of Seattle* and *Mid-County Future Alternatives*, which apply limitations established in other voting rights cases that did not involve gerrymandering or racial discrimination. The court below, in essence, held that challenges to incorporation voting laws present a non-justiciable political question which is better left to the judgment of the State legislature. It is well established, however, that these types of voting rights claims are justiciable and state a proper cause of action. *See Davis v. Bandemer*, 478 U.S. 109 (1986) (rejecting claim that political gerrymandering claims raise a non-justiciable political question); *St. Louis County v. City of Town and*

(Continued from previous page)

scrutinize such a statute if it discriminated on the basis of race. The only exception referred to by the court was that of gerrymandering, such as that which occurred for racially discriminatory purposes in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Even *People ex rel. Landwer v. Village of North Barrington*, 94 Ill. App. 2d 265, 237 N.E.2d 350 (2d Dist. 1968), also relied on by the court below, does not support this narrow view. The *Landwer* court, in describing the exception to the general rule that the state has broad discretion in these matters, did not limit the exception to cases involving racial discrimination. It referred to racial discrimination only as an example of an improper exercise of municipal power that would invoke the exception:

> An exception to this rule is found in those cases where the state uses its power of municipal boundaries to circumvent a Federally protected right, such as the gerrymandering of voting districts so as to discriminate against negro voters, as was the case in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

237 N.E.2d at 353. The *Landwer* case involved the sufficiency of a published notice of a proposed annexation. No election was involved, and no voting rights were alleged. The court concluded that no federally protected right was present.

Country, 590 F. Supp. 731, 736 (E.D. Mo. 1984), and cases cited therein. By framing the issue in this way, the appellate court demonstrated its basic misapprehension of the law relating to voting rights and municipal boundaries.

II.

STATE AUTHORITY OVER MUNICIPAL BOUNDARIES IS NOT ABSOLUTE.

Contrary to the opinion of the court below, this Court has explained that any argument that the State has absolute power over municipalities misconceives the reach of *Hunter*. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, this Court explained that its decision in *Hunter* merely establishes two principles: (1) that there is no inherent contractual obligation between the State and its subordinate governmental entities that is protected by the Contract Clause or the Due Process Clause, and (2) that the State, without running afoul of the Due Process Clause, may change the identity of a municipality in such a way as to realign its tax burdens and thus cause some economic disadvantage to its residents. 364 U.S. at 343. "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-45.

This case turns on the exception to a general rule – an exception which the appellate court misconstrued in its ruling. The general rule, as expressed in *Hunter* and acknowledged in other cases, *see Carrington v. Rash*, 380 U.S. 89 (1965), states that the State has broad discretion to determine the extent of direct voter participation in municipal boundary issues. The overriding exception to this general rule is that once the extent of the voting franchise is determined, *every* qualified citizen has a constitutionally protected right to participate in the electoral process on an equal basis with all other qualified citizens who share substantially the same

interest. *See Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Evans v. Cornman*, 398 U.S. 419 (1970); *Little Thunder v. State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975). *See also Moore v. Ogilvie*, 394 U.S. 814 (1969); *Communist Party of Illinois v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975); *United States v. South Dakota*, 636 F.2d 241 (8th Cir. 1980).

III.

THE MUNICIPAL CONSENT PROVISION OF SECTION 2-3-5a OF THE ILLINOIS MUNICIPAL CODE INFRINGES ON APPELLANTS' VOTING RIGHTS, IS NOT NECESSARY TO ADVANCE A COMPELLING STATE INTEREST, AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A.

Appellants Have A Constitutionally Protected Right To Vote For Municipal Incorporation Where The State Places The Final Decision On Incorporation In The Hands Of The Voters Residing In The Area To Be Incorporated.

A right to vote for municipal incorporation or annexation exists when the legislature places the final decision in the hands of the voters. *Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984); *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 714 P.2d 386, *appeal dismissed* 447 U.S. 906 (1986); *City of Seattle v. State of Washington*, 103 Wash.2d 663, 694 P.2d 641 (1985). A state legislature does not have to place municipal incorporation or boundary decisions in the hands of the affected voters. Once it does, however, the electors are protected by all of the constitutional principles applicable to elections. *See Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978) (when state provides for final election on annexation, all constitutional principles relevant to elections apply); *Curtis v. Board of Supervisors of Los Angeles County*, 7 Cal. 3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 (1972) (when state provides procedures for incorporation of cities by election, all constitutional

principles relevant to elections apply). *Compare Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (even though State need not provide appellate review, once it does so, the Equal Protection Clause keeps it from being arbitrarily denied to some persons). Section 2-3-6 of the Illinois Municipal Code provides that villages may only be incorporated by election.[2] Therefore, Appellants have a right to vote on whether to incorporate the Village of Forest Knoll.

The Constitution of the United States protects the fundamental right of all qualified citizens to vote at the local, state, and federal levels. *Reynolds v. Sims*, 377 U.S. 533, 554; *Avery v. Midland County*, 390 U.S. 474 (1968); *League of Women Voters v. Fields*, 352 F. Supp. 1053, 1054 (E.D. Ill. 1972). In considering whether to restrict the power of states to impose limitations on the voting franchise, this Court stated the following in *Reynolds v. Sims*, 377 U.S. at 562-63:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights." 118 U.S. at 370, 6 S.Ct. at 1071.

In the case at bar, this most fundamental right is at stake. Illinois' village incorporation statute grants the

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2. Although a petition to incorporate must be filed with the circuit court pursuant to Section 2-3-5a, the court has no discretion and only acts in an administrative capacity to ensure that the facts alleged in the petition have been established. *People ex rel. County of DuPage v. Lowe*, 36 Ill. 2d 372, 224 N.E.2d 1 (1967).

right to vote on municipal incorporation to some residents of unincorporated areas, but places an added burden on the exercise of that right by other, similarly situated residents of unincorporated areas. The result, as happened in this case, is the denial of the right to vote that those persons have on whether or not to incorporate the lands on which they reside.

B.

Appellants Have Substantially The Same Interests As Residents Of More Populated Unincorporated Areas.

The fact that the State need not submit the question of whether or not to incorporate to the voters does not diminish the importance of the voting franchise once it is established. As this Court held in *Cipriano v. City of Houma*, "no less showing that the exclusions are necessary to promote a compelling state interest is required merely because 'the questions scheduled for the election need not have been submitted to the voters.' " 395 U.S. 701 (1969) *quoting Kramer v. Union Free School District*. Whether the statute limiting the franchise denies equal protection of the law depends on "whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Id. See also Evans v. Cornman*, 398 U.S. 419, 424-26 (1970); *Kramer*, 395 U.S. at 630 (plaintiff was as substantially interested and significantly affected as other qualified voters in outcome of election); *Little Thunder v. South Dakota*, 518 F.2d 1253, 1256 (8th Cir. 1975) (residents of unorganized county and organized county had same interest in voting for county officials); *United States v. South Dakota*, 636 F.2d 241, 245 (8th Cir. 1980) (residents of unorganized county and organized county had same interest in running for county office). What matters is that the residents of unincorporated areas for whom the franchise is restricted have substantially the same interests as the residents of unincorporated areas that do have the right to vote unencumbered by the veto power held by nearby municipalities.

The Illinois legislature has determined that villages may only be incorporated by the final vote of the residents living within the area to be incorporated. The Appellants' interests in this case are the same as those held by persons who live in unincorporated areas with a population of greater than 7,500. Both groups have the same interest in incorporating themselves into a new village to provide the level of urban services and types of local government regulations that they see fit. It is inconceivable that the residents of unincorporated areas with a population greater than 7,500 would have a more substantial interest in voting to incorporate than would the residents of a less populated unincorporated area. Nonetheless, Section 2-3-5a places an added burden on the ability of persons in areas with a population of less than 7,500 to incorporate, and thus excludes these people from exercising the voting franchise in the same manner as persons in more populated areas.

C.

The Extra Burden Which Section 2-3-5a Imposes On The Voting Franchise of Residents of Less Populated Areas Must Be Necessary To Promote A Compelling State Interest.

Because the right to vote, once granted is a fundamental right, the statute in this case must be necessary to promote a compelling state interest, and narrowly tailored so as not to exclude otherwise qualified voters from elections, in order to withstand a challenge based on the Equal Protection Clause. As this Court held in *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 627-28 (1969):

> if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary to promote a compelling state interest.* . . . The "rational basis" test and presumption of validity afforded to legislation do not apply when reviewing statutes which deny some residents the right to vote.

" '[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' . . . Our exacting examination . . . is required because some resident citizens are permitted to participate and some are not." *Id.* at 629, *quoting Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). *Accord Cipriano v. City of Houma,* 395 U.S. 701, 704 (1969); *Hill v. Stone,* 421 U.S. 289, 296 (1975). This same test applies when the state restricts its granting of the franchise on the basis of the population of the areas affected. *Moore v. Ogilvie,* 394 U.S. 814, 818-19 (1969); *Communist Party of Illinois v. State Board of Elections,* 518 F.2d 517, 521 (7th Cir. 1975) ("If other means exist which will adequately protect the state interest involved, but which will be less intrusive on the right to vote or less discriminatory in effect, such other means must be employed.").[3]

Elections for the creation or expansion of municipalities are elections of general interest. *Curtis v. Board of Supervisors of Los Angeles County,* 7 Cal. 3d 942, 104 Cal. Rptr. 297, 501 P.2d 537, 549 (1972) ("all residents share a substantial interest in the government of their state, city, county, school district, and other agencies of general governmental power"). In elections of general interest, the Equal Protection Clause requires that any restrictions on the right to vote for reasons other than age, citizenship or residence must be necessary to serve a compelling state interest.

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3. Moreover, such protection applies not only to the basic right to vote, but also to the right to run for public office or to have the candidates of one's party appear on the ballot. *See Moore; Communist Party; United States v. State of South Dakota,* 636 F.2d 241 (8th Cir. 1981). The protection of the voting franchise therefore is not limited only to the right to vote for one's representatives in government, but to all aspects of the election prccess, such as the right to run for public office or present a slate of candidates to the voters.

Hill v. Stone, 421 U.S. 298 (1975) (election to authorize issuance of general obligation bonds to fund construction of city library was not special interest election); *City of Seattle v. State of Washington*, 103 Wash.2d 663, 694 P.2d 641, 647 (1985) (annexation election "involves a matter of substantial interest to all residents"). Appellants contend that the consent provision of Section 2-3-5a cannot satisfy this exacting standard and must be invalidated.

Section 2-3-6 provides for an election of general interest for the incorporation of villages. Yet the right to vote in an election to incorporate a village with a population of less than 7,500 can be foreclosed by neighboring municipalities by their refusal to consent under Section 2-3-5a. That is precisely what happened in the present case. Seven of the eight municipalities within 1½ miles of the boundaries of the proposed Village of Forest Knoll refused to consent to the incorporation. By refusing to consent, those municipalities, the Appellees here, deprived Appellants and the other residents of the proposed Village of Forest Knoll of their right to vote. Since the municipal consent provision of Section 2-3-5a is not an age, residency or citizenship restriction, it can only be upheld if it is necessary to serve a compelling state interest. Similarly, Sections 2-3-5a and 2-3-6 grant an unimpaired right to vote to residents of more populated unincorporated areas and restrain the right to vote of residents of less populated unincorporated areas. Given that the statute grants a right to vote to some bona fide residents of unincorporated areas and denies it to others, the statute must be shown to be necessary to promote a compelling state interest.[4]

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4. The Second District's decision intimates that the "compelling state interest" test applies only in cases where otherwise qualified voters are discriminated against on the basis of race or some other "suspect class". *See* 513 N.E.2d at

(Continued on following page)

1.

Statutes which burden the voting franchise of one group, but not another, on the basis of population must be necessary to promote a compelling state interest.

Statutory distinctions that discriminatorily affect voting rights on the basis of population are subject to the more exacting "compelling state interest" standard. In *Moore v. Ogilvie,* 394 U.S. at 819, this Court held that a system of nominating candidates for statewide office which discriminated against residents of populous areas in favor of residents of rural areas lacked the equality to which the exercise of political rights is entitled under the Fourteenth Amendment. In *Communist Party of Illinois v. State Board of Elections,* 518 F.2d at 521, the Seventh Circuit declared that a statute which "directly affects the fundamental right of a class of persons to 'vote effectively' . . . cannot stand unless it is necessary to advance a compelling state interest. . . . If other means exist which will adequately protect the state interest involved, but which will be less intrusive on the right to vote or less discriminatory in effect, such other means must be employed".

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441, and 513 N.E.2d 442 ("not a case involving the gerrymandering of political districts so as to discriminate against a certain class of voters such as was the case in *Gomillion v. Lightfoot*"). There are, however, ample cases applying the "compelling state interest" test in situations where otherwise qualified voters were denied the voting franchise on the basis of characteristics that have not been elevated to "suspect" status. *See Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969); *Evans v. Cornman,* 398 U.S. 419 (1970); *Moore v. Ogilvie,* 394 U.S. 814 (1969); *Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Hill v. Stone,* 421 U.S. 289 (1975); *Little Thunder v. State of South Dakota,* 518 F.2d 1253 (8th Cir. 1975); *Communist Party of Illinois v. State Board of Elections,* 518 F.2d 517 (7th Cir. 1975).

The statute at issue in *Moore* required that a petition to nominate candidates for general election be signed by at least 25,000 qualified voters, including at least 200 qualified voters from each of at least 50 counties. *Moore,* 394 U.S. at 815. The Court began its analysis by stating: "When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy is present." *Id.* at 817. The alleged justification for discriminating on the basis of county population was that the statute was designed to require statewide support for launching a new political party. *Id.* at 818. The Court found that the "use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system", and held that "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." *Id.* at 818. Finding that 53 counties in Illinois, with a total of 6.6 percent of all registered voters in the State could start a new party, but the other 49 counties in Illinois, with 93.4 percent of the voters, could not, the Court held that the statute violated the Equal Protection Clause because it applied "a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights." *Id.* at 818-19.

In *Communist Party of Illinois v. State Board of Elections,* 518 F.2d 517, 518 (7th Cir. 1975), the statute struck down in *Moore* was modified to require a party seeking to place candidates on the statewide ballot to submit a petition signed by at least 25,000 qualified voters, with no more than 13,000 voters from any one county. The alleged justifications for discriminating on the basis of population were: (1) to assure that residents throughout the State have an equal opportunity to be involved in statewide political party activities, and (2) to assure that multifarious political associations with little or no popular support would not

"bemuse" the electoral process. *Id.* at 519. Under this statutory scheme, the Seventh Circuit found that the electorate of Cook County, containing 45 percent of the registered voters in the state, could not form a new political party, but 25,000 voters in any two other counties in rural downstate Illinois could do so. *Id.* at 521. Following *Moore v. Ogilvie,* the Seventh Circuit held that the statute violated the Equal Protection Clause. *Id.*

In the instant case, petitioning for a referendum on incorporation is as integral a part of Illinois' system for municipal incorporation as the use of nominating petition to obtain a place on the statewide ballot was in Illinois' system of general elections in *Moore v. Ogilvie.* Under the statutory system of incorporation in Illinois, incorporation of a village may only occur with a vote of the residents of the area to be incorporated. Ill. Rev. Stat. ch. 24, ¶ 2-3-6 (1985). The State of Illinois, however, imposes an additional burden on incorporation referenda in some areas solely on the basis of population. As pointed out in *Communist Party of Illinois,* such a burden can withstand an equal protection challenge only if it is necessary to advance a compelling state interest. As Appellants demonstrate below, the consent provision of Section 2-3-5a fails to pass this test.

2.

Statutes which grant municipalities the power to veto binding incorporation elections must be necessary to promote a compelling state interest.

An election under Section 2-3-6 for incorporation of a new village with a population of less than 7,500 may only be held if all of the existing municipalities within 1½ miles of the area consent. Ill. Rev. Stat. ch. 24, ¶ 2-3-5a (1985). This power to veto incorporation elections infringes upon and burdens the right to vote.

Similar statutes from other states have been invalidated as unconstitutional under the Equal Protection Clause of the fourteenth amendment.

In *Curtis v. Board of Supervisors of Los Angeles County,* 7 Cal. 3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 (1972), the California Supreme Court struck down a statute that allowed the owners of 51 percent of the assessed value of the land within territory proposed for incorporation to terminate the proceedings and thereby veto the final vote on the issue of incorporation. The court applied the compelling interest test even though the law in question did not provide for an election by the landowners and thus did not establish electoral qualifications. This is because the test applies to all laws that "touch upon" or "burden" the right to vote. 501 P.2d at 544.

> We conclude that a statute which confers power to halt an election, and thus to prevent all qualified voters from casting their vote, must be considered to "touch upon" and to "burden" the right to vote, and therefore must be examined under the strict equal protection standards.

501 P.2d at 546. In concluding that there was no compelling interest served by the restriction, the *Curtis* court stated that "we entertain no doubt that the state cannot enact a provision which gives absentee and corporate landowners the power to *override* the needs and interests of the residents". 501 P.2d at 551 (emphasis in the original).

In *Levinsohn v. City of San Rafael,* 40 Cal. App. 3d 656, 115 Cal. Rptr. 309 (1st Dist. 1974), the court invalidated a municipal annexation statute which contained the same veto provision as the municipal incorporation statute reviewed in *Curtis.* The fact that the statute involved annexation rather than incorporation did not affect the court's analysis:

> Incorporation and annexation are two different procedures to attain the same goal. The resulting benefits in such public services as police and fire

> protection, maintenance of streets and the development of parks, as well as the detriment resulting from the imposition of taxes, are identical.

115 Cal. Rptr. at 310. Thus, the cases concerning annexation statutes are equally applicable to the present case.

The Supreme Court of Washington recently invalidated under the Equal Protection Clause an annexation statute granting landowners the power to veto an annexation election. *City of Seattle v. State,* 103 Wash.2d 663, 694 P.2d 641 (1985). The court recognized that the statute did not directly limit the right to vote to property owners but did give them the power to prevent an election from taking place. The court found that the statute "restricts the effective franchise and burdens of the right to vote" and consequently "is valid only if it is necessary to promote a compelling state interest." 694 P.2d at 647. Because the state did not show that it had a compelling interest in allowing property owners to block an election by all voters in the area, the Court held that the statute was invalid.

In *Mid-County Future Alternatives Committee v. Metropolitan Area Local Government Boundary Commission,* 82 Or. App. 193, 728 P.2d 63 (1986), *modified,* 83 Or. App. 552, 733 P.2d 451 (1987), the court held that a provision of the Oregon annexation statute was unconstitutional. The statute provided that certain annexations were subject to the approval of the voters if a valid objection was filed; however, such an election could be overridden if the requisite number of landowners in the area consented to the annexation. The statute did not require the city to act on the annexation if the landowners consented. The court observed that "the *only* effect of the consent process is to foreclose all of the resident electors in the affected territory from voting on an annexation proposal". 728 P.2d at 67. The decision was based on the privileges and immunities clause of the Oregon Constitution, but the court said that its reasoning was also supported by an analysis

under the Equal Protection Clause of the United States Constitution.[5]

In *Mid-County,* the court also observed that courts have even permitted alternative methods of annexation, some that provide for voting and some that do not. 728 P.2d at 67, *citing Carlyn v. City of Akron,* 726 F.2d 287 (6th Cir. 1984), *Adams v. City of Colorado Springs,* 308 F.Supp. 1397 (D.Colo. 1970), *affirmed,* 399 U.S. 901 (1970), and *Weber v. City of Thousand Oaks,* 9 Cal. 3d 950, 109 Cal. Rptr. 553, 513 P.2d 601 (1973). The court noted that these cases do not stand for the proposition, however, that a statute that forecloses a binding election is constitutionally permissible.

The above cases show that the "compelling state interest test" applies when the State grants one group of veto power over the voting franchise of another group. If the interests of landowners, who will be governed and taxed by a new municipality, are not

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5. Both *City of Seattle* and *Mid-County Future Alternatives Committee* distinguished the cases upholding annexation statutes challenged on the grounds that they confer the right to petition to annex on some groups but not on others. *See, e.g., Berry v. Bourne,* 588 F.2d 422 (4th Cir. 1984); *Goodyear Farms v. City of Avondale,* 148 Ariz. 216, 714 P.2d 386, *appeal dismissed,* 477 U.S. 901 (1986); *Doenges v. City of Salt Lake City,* 614 P.2d 1237 (Utah 1980). These cases involved only the right to petition for annexation, not the right to vote. The final decision on annexation in each of these cases was by the governing body of the annexing municipality and not by the voters. The petitioners only had the right to initiate the annexation process. Since "[t]he petitioning process . . . is not analogous to voting, and therefore does not infringe on a fundamental right, . . . the proper test to apply . . . is the rational basis test". *Goodyear Farms v. City of Avondale,* 714 P.2d at 392.

The right to petition cases are also inapposite to the present case. The final incorporation decision under Section 2-3-6 is made by the voters. Therefore, a voting right exists, and the cases relating to voting rights are the only ones on point.

sufficient to meet the compelling interest test, the interests of municipalities that may be noncontiguous and as far away as 1½ miles certainly are not sufficient to justify the unrestricted power to veto an election. For the reasons discussed below, the consent provision of Section 2-3-5a is not necessary to promote a compelling state interest.

It should be pointed out that the Appellants in this case are not challenging any other extraterritorial powers exercised by any of the Appellees over the lands Appellants wish to incorporate. Under Illinois law, the lands which Appellants wish to incorporate may be located within the extraterritorial jurisdiction of existing municipalities and, if so, are governed by the neighboring municipalities' regulations relating to special assessments, roads, water and sewer service, land use planning, building and land subdivision, and exactions. *See* Ill. Rev. Stat. ch. 24, ¶¶ 11-12-5, 11-12-6, 11-12-8, and 11-12-11; *Krughoff v. City of Naperville*, 68 Ill. 2d 352, 369 N.E.2d 892 (1977). Appellants do not challenge the extraterritorial exercise of these powers by any of the Appellees.

The instant case therefore does not concern the same principles or issues which this Court addressed in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). *Holt Civic Club* held that the extraterritorial extension of municipal powers by the state need not be accompanied by an extension of the franchise to vote in municipal elections to persons residing outside the municipality. Appellants in the instant case do not seek the right to vote for municipal officials who exercise extraterritorial jurisdiction over the unincorporated area in which they live. Rather, they seek to exercise their right to vote for incorporation to the same extent as, and therefore to be treated the same as, residents of other unincorporated areas in Illinois.

The difference in the instant case is that the statute does not just grant existing municipalities the ability to regulate some activities outside their borders; rather, it grants them unfettered control over the

Appellants' basic right to vote on whether or not to incorporate their own village.[6] No decision of this Court or any court has extended "extraterritorial jurisdiction" this far, so as to allow a municipality to deprive persons living outside the municipal boundaries of their constitutionally protected rights. Just as the Appellees could not exercise their existing power to regulate land development outside their borders so as to deprive someone of their property without just compensation or to deprive someone of their right to due process of law, in derogation of the United States Constitution, *see Nectow v. Cambridge*, 277 U.S. 183 (1928); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378 (1987), they should not be able to exercise power outside their borders to deny someone the voting franchise.

D.

Granting Veto Power To Nearby Municipalities Over the Appellants' Right To Vote For Incorporation Is Not Necessary To Promote A Compelling State Interest.

Analysis of Section 2-3-5a reveals that allowing nearby municipalities to veto the ability of the residents of an unincorporated area of less than 7,500 persons to vote on incorporation, but not to veto an

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6. The instant case is more analogous to *Little Thunder v. State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975), and *Evans v. Cornman*, 398 U.S. 419 (1970). This Court has explained those decisions as being based on the fact that one local government entity was exercising the same governmental powers over persons outside its borders as it was exercising inside its borders, and that the interests of the persons whose voting franchise was restricted had substantially the same interest in the electoral process as persons whose voting franchise was not restricted. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. at 72 n. 8. The instant case involves a similar measure of extensive control by an existing municipality over the fundamental interest in municipal incorporation and self-government held by persons outside its borders.

incorporation referendum for an unincorporated area with more than 7,500 persons, is not necessary to serve a compelling state interest.

Appellees in the instant case have failed to put forth a compelling state interest which justifies the municipal consent provision of Section 2-3-5a. Laws which impinge on fundamental rights or infringe upon the rights of a suspect class are subject to strict scrutiny, and the burden shifts to the State to prove that the challenged provision promotes a compelling state interest in the least restrictive manner. *Georges v. Carney,* 691 F.2d 297 (7th Cir. 1982). In the court below, the only rationale for Section 2-3-5a suggested by Appellees was that the consent provision serves "to prevent the incorporation of villages too small to provide urban services to their residents." *Kaltsas v. City of North Chicago,* 513 N.E.2d at 441. Such an interest, while legitimate, apparently is not compelling to the legislature. First, Section 2-3-5a does not directly advance such an interest. An area with fewer than 7,500 residents may be as fiscally sound as, or more fiscally sound than, an area with more than 7,500 residents. Second, such an interest is not served by allowing existing, very small villages to exercise such judgment over unincorporated areas with populations more than 20 times their own. Appellee Village of Mattawa has a population of only 327, Appellee Village of Green Oaks has a population of only 1,051, and Appellee Village of Lake Bluff has a population of 4,478. BUREAU OF THE CENSUS, U.S. DEPT. OF STATE, Series P-26, No. 82-13-SC, *Current Population Reports* (Sept. 1984). *See DiModica v. Department of Employment Security,* 164 Ill. App. 3d 445, 517 N.E.2d 1197 (2d Dist. 1988) (proper for a reviewing court to take judicial notice of the population of a city). A compelling state interest is hardly served by a system that allows a village of 327 to determine whether a proposed village of 7,499 is too small to provide urban services to its residents. Indeed, such a system does not even satisfy the rational basis test.

The municipal consent provision of Section 2-3-5a also is not necessary to serve a compelling state interest because the Illinois Municipal Code already provides another means for determining whether a proposed village will be capable of providing services to its residents. Section 2-3-18, which applies to all proposed villages and not just those with less than 7,500 residents, provides in relevant part as follows:

> the county board, by resolution, may provide that before the question of incorporating a village under this Division is submitted to the electors in response to a petition filed under Section 2-3-5[7] or 2-3-10 the county board must first determine that (1) the proposed incorporation is compatible with the official plan for the development of the county, and (2) the lands described in the petition as intended to be embraced in the village constitute *a sufficient tax base as will insure the ability of the village to provide all necessary municipal services to its inhabitants.* When such a resolution is in effect, the court in which such a petition is filed shall first require a showing that those determinations have been made by the county board. If no such showing is made, the court shall deny the petition. If such a showing is made, the court shall proceed as provided in Section 2-3-6 or 2-3-11, as the case may be.

Ill Rev. Stat. ch. 24, ¶ 2-3-18 (1985) (emphasis added). Since the legislature has already provided a method for determining whether a proposed village will be financially able to provide the necessary municipal services, the consent provision of Section 2-3-5a is not necessary to serve that purpose and therefore fails the compelling interest test.

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7. Section 2-3-18 also applies to petitions filed under Section 2-3-5a. *In the Matter of a Petition to Call an Election on the Question of Incorporating the Village of Forest Knoll,* 148 Ill. App. 3d 436, 499 N.E.2d 129 (2d Dist. 1986).

Assuming Section 2-3-18 is constitutionally acceptable, and Appellants do not concede that it is, it provides a much more equitable and rational screening process. First, the county board is empowered to make the determination. Since all voters in Lake County, including those in unincorporated territory, vote for county board members, the review is not conducted by elected officials who are not accountable to petitioners for municipal incorporation. Moreover, there is no distinction made between voters in less populous areas and those in more populous areas. One group is not favored over the other. Finally, Section 2-3-18 provides standards to guide the county board in making its determinations. Section 2-3-5a provides no guidelines and grants nearby municipalities unfettered discretion. Although Appellants do not concede that Section 2-3-18 does not violate the Equal Protection Clause, the constitutional infirmity of Section 2-3-5a is even more apparent when compared to Section 2-3-18.

The municipal consent provision of Section 2-3-5a of the Illinois Municipal Code is not necessary to advance a compelling state interest, and therefore must be invalidated under the Equal Protection Clause of the fourteenth amendment.

IV.

THE MUNICIPAL CONSENT PROVISION OF SECTION 2-3-5a INFRINGES ON APPELLANTS' VOTING RIGHTS, IS NOT NECESSARY TO ADVANCE A COMPELLING STATE INTEREST, AND THEREFORE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Appellants' complaint before the courts below also included a claim that Section 2-3-5a violated their rights to substantive due process under the fourteenth amendment. Where a fundamental right is involved, the same "compelling state interest" test which applies to the equal protection claim also applies to the substantive due process claim. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978); *Construction Industry Ass'n v. City of Petaluma*, 522 F.2d 897, 906 n. 11

(9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). Therefore, Appellants advance the same argument stated above for the proposition that the municipal consent provision of Section 2-3-5a of the Illinois Municipal Code violates their substantive rights under the Due Process Clause of the fourteenth amendment. Appellants' right to vote on the issue of village incorporation is fundamental. Because the municipal consent provision of Section 2-3-5a is not necessary to advance a compelling state interest, that provision violates the Due Process Clause.

V.

THE MUNICIPAL CONSENT PROVISION OF SECTION 2-3-5a VIOLATES APPELLANTS' RIGHT TO PROCEDURAL DUE PROCESS BY DENYING APPELLANTS AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF MUNICIPAL CONSENT AND BY LACKING ADEQUATE STANDARDS TO GUIDE MUNICIPALITIES.

Section 2-3-5a also offends procedural due process. When a protected interest is implicated by some statute or rule, the right to some kind of hearing prior to deprivation of the interest is paramount. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Therefore, procedural due process mandates that Section 2-3-5a provide for a hearing on the issue of consent. The statute in question, however, provides no such hearing.

Although Section 2-3-5a requires a hearing on the question of whether the statutory criteria are met, that hearing does not satisfy the requirements of procedural due process because the neighboring municipalities' decision whether to consent or object to incorporation is not at issue in that hearing.[8] Moreover, by the time

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8. The circuit court hearing is *ex parte* in nature, *In re Proposed Incorporation of Village of Beach Park, Lake County, Illinois*, 158 Ill. App. 3d 207, 511 N.E.2d 858 (2d

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that hearing has been held, the neighboring municipalities have already made a determination of whether or not to consent. Even if it were possible to raise the appropriateness of a municipality's decision within the context of that proceeding, due process would still be denied where the proceeding is summarily dismissed, as was the case here. Thus, even under a broad conception of the Section 2-3-5a hearing, procedural due process would be denied.

The statute offends due process in another respect. Not only does it fail to provide for a hearing on the issue of consent, it also delegates to neighboring municipalities the authority to make this determination without providing any standards to guide their decision. Although the legislature may delegate the power to implement a statute to others, the delegation must contain standards to guide the entity charged with its implementation. *Village of Lombard v. Pollution Control Board*, 66 Ill. 2d 503, 363 N.E.2d 814, 816-817 (1977); *Auerbach v. Rettaliata*, 765 F.2d 350 (2d Cir. 1985) (local election officials may be accorded discretion to determine voter residency when determination is guided by statutory standards and is subject to judicial review). The standards must be intelligible and may not permit unfettered discretion in the application of the provision. *See generally Hoogasian v. Regional Transit Authority*, 58 Ill. 2d 117, 317 N.E.2d 534, 541 (1974). Section 2-3-5a fails to provide *any* standard

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Dist. 1987), and municipal objectors lack standing to participate in such hearings. *In re Petition To Call An Election On the Question Of Incorporating the Village of Forest Knoll*, 517 N.E.2d 1188 (2d Dist. 1987). Moreover, the circuit court has no discretion with respect to petitions filed under Section 2-3-5a and may only conduct a preliminary review to determine whether the statutory requirements have been met. *People ex rel. DuPage County v. Lowe*, 36 Ill. 2d 372, 224 N.E.2d 1 (1967).

with regard to when a neighboring municipality may or must object. The matter is left entirely to the unfettered discretion of the neighboring municipality. Moreover, the statute does not provide for review of the municipalities' decision to object. Accordingly, the municipal consent provision of Section 2-3-5a violates Appellants' right to procedural due process.

VI.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court note probable jurisdiction of this appeal.

Respectfully submitted,

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May 3, 1988

APPENDIX A

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 2-86-0568

IN THE

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

(Filed August 12, 1987)

JOHN L. KALTSAS, FRED ENGBRECHT, DIANA ENGBRECHT, BRUCE L. FELKNOR, EDITH J. FELKNOR, JAMES E. WARD, KEVIN CALAHAN and GABRIELLE CALAHAN,	)	Appeal from the Nineteenth Judicial Circuit, Lake County, Illinois.
Plaintiffs-Appellants,	)	No. 86 CH 193
v.	)	Honorable John L. Hughes, Judge Presiding.
CITY OF NORTH CHICAGO, CITY OF LAKE FOREST, CITY OF WAUKEGAN, VILLAGE OF LAKE BLUFF, VILLAGE OF GREEN OAKS and VILLAGE OF METTAWA,	)	
Defendants-Appellees.	)	Publ. in Full

JUSTICE WOODWARD delivered the opinion of the court:

Plaintiffs, John L. Kaltsas, Fred Engbrecht, Diana Engbrecht, Bruce L. Felknor, Edith J. Felknor, James E.

Ward, Kevin Calahan, and Gabriella Calahan, appeal from a trial court order dismissing their complaint for failure to state a cause of action.

Plaintiffs are residents of an area located in unincorporated Lake County, Illinois. They sought to incorporate the area as a village to be known as Forest Knolls. The area is more than four square miles and contains more than 2,500 residents but less than 7,500 residents. Lake County has a population of more than 150,000. Based upon those facts, the proposed incorporation is controlled by section 2-3-5a of the Illinois Municipal Code (Ill. Rev. Stat. 1985, ch. 24, par. 2-3-5a) which provides in pertinent part as follows:

> "If the area contains fewer than 7,500 residents and lies within 1½ miles of the limits of any existing municipality, the consent of that municipality must be obtained before the area may be incorporated." (Ill. Rev. Stat. 1985, ch. 24, par. 2-3-5a.)

The area in question here is within 1½ miles of the city of Park City and the defendants, city of North Chicago, city of Lake Forest, city of Waukegan, village of Lake Bluff, village of Green Oaks, and village of Mettawa.

On November 18, 1985, pursuant to section 2-3-5a, plaintiffs filed a petition with the circuit clerk of Lake County to call an election on the question of incorporating the village of Forest Knolls. However, while Park City consented to the proposed incorporation, the defendants refused to consent. On January 2, 1986, on motions for judgment on the pleadings filed by the defendants, the trial court dismissed the petition. The plaintiffs appealed, and on review by this court, we reversed the trial

court's decision on the basis that the trial court had not complied with section 2-3-18 of the Illionis Municipal Code (Ill. Rev. Stat. 1985, ch. 24, par. 2-3-18) and, therefore, was premature in dismissing the petition on the basis of failure to secure the necessary consents. *In re Petition to Call an Election* (1986), 148 Ill. App. 3d 436.

In the meantime, on April 2, 1986, the plaintiffs filed the present complaint against the same defendants, setting forth the facts surrounding the dismissal of the petition to incorporate and alleging in pertinent part as follows:

> "26. By failing and refusing to consent to the incorporation of Forest Knoll pursuant to the municipal consent provision of section 2-3-5a, which is void, invalid and unconstitutional on its face, Defendants have deprived Plaintiffs of their constitutionally protected rights to vote and to petition and of essential government services and have caused a diminution of Plaintiff's property values in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. sec. 1983."

The relief sought by the plaintiffs included a finding that section 2-3-5a was unconstitutional, that the consent of the surrounding municipalities was unnecessary, and that the trial court should proceed with the hearing authorized by section 2-3-6. Ill. Rev. Stat. 1985, ch. 24, par. 2-3-6.

The defendants filed motions to strike and dismiss the complaint. On June 5, 1986, following the submission of briefs and oral arguments, the trial court dismissed the complaint with prejudice. This appeal followed.

Plaintiffs contend that section 2-5-5a violates the constitutional guarantees of equal protection and substantive due process. Plaintiffs argue that it is a denial of equal protection for the State to extend the franchise to vote or petition for village incorporation to some voters in populous areas and withhold the franchise from similarly situated voters in less populous areas, unless the distinction is necessary to promote a compelling State interest. They argue further that the State is denying the unincorporated area's citizens the right to vote to consider incorporation. Inasmuch as the test for a violation of equal protection is the same for substantive due process, the following analysis is applicable to both issues.

Equal protection claims arise when a charge is made that similarly situated individuals are treated in different ways without a rational relationship to a legitimate State purpose. (*McKinney v. George* (7th Cir. 1984), 726 F.2d 1183.) The government may differentiate between persons similarly situated as long as the classification bears a reasonable relationship to a legitimate legislative purpose, and where no fundamental right or suspect class is involved, a legislative classification need have only a rational relationship to a legitimate State purpose in order to be upheld. (*Mount Prospect State Bank v. Village of Kirkland* (1984), 126 Ill. App. 3d 799.) However, laws in which challenged provisions infringe upon rights of a suspect class or impinge on fundamental rights are subject to strict scrutiny, and the burden of proof shifts to the State to prove that the challenged provision promotes a compelling interest in the least restrictive manner. *Georges v. Carney* (7th Cir. 1982), 691 F.2d 297.

Plaintiffs acknowledge that the State has broad discretion to determine the extent of direct voter participation in municipal boundary issues. (See *Carrington v. Rash* (1965), 380 U.S. 89, 13 L. Ed. 2d 675, 85 S. Ct. 775.) However, they argue that an exception has been established in that once the extent has been determined, every citizen has a constitutionally protected right to participate in the electoral process on an equal basis with all other citizens similarly situated. *Little Thunder v. State of South Dakota* (8th Cir. 1975), 518 F.2d 1253.

Plaintiffs argue further that the State has not shown any compelling State interest to justify the restriction in voting rights. The reason proffered by the defendants is that the consent requirement is to prevent the incorporation of villages too small to provide urban services to their residents. Plaintiff's rely on *Communist Party of Illinois v. State Board of Elections* (7th Cir. 1975), 518 F.2d 517, wherein the United States Court of Appeals for the Seventh Circuit struck down an Illinois statute which required 25,000 signatures of qualified voters, not more than 13,000 of which could be counted from any one county, because it discriminated against the residents of populous counties in favor of the rural counties. Further, the plaintiffs rely on this court's recent opinion in *In re Petition to Call an Election* (1986), 148 Ill. App. 3d 436. In that case, this court reversed the trial court's dismissal of plaintiff's petition for incorporation on the basis that there was no showing of compliance with section 2-3-18 (Ill. Rev. Stat. 1985, ch. 24, par. 2-3-18). That section requires that before the question of incorporation is submitted to the electors, the county board must first deter-

mine that "(1) the proposed incorporation is compatible with the official plan for the development of the county, and (2) the lands described in the petition as intended to be embraced in the village constitute a sufficient tax base as will insure the ability of the village to provide all necessary municipal services to its inhabitants." Thus, the plaintiffs argue that the provisions of section 2-3-18 negate the need for the consent requirement in section 2-3-5a.

The pivotal question to be answered is whether the issue in this case is one of voting rights as urged by the plaintiffs or municipal boundaries as suggested by the defendants. In *People ex rel. Landwer v. Village of North Barrington* (1968), 94 Ill. App. 2d 265, a constitutional challenge was raised as to the adequacy of the notice of annexation of certain property to the village. This court determined that no fundamental right was involved, and quoting extensively from *Hunter v. City of Pittsburg* (1907), 207 U.S. 161, 177-79, 52 L. Ed. 151, 158-59, 28 S. Ct. 40, 46-47, further stated as follows:

> "It is fundamental that municipalities are creatures of the Legislature and entirely subject to the legislative will. * * * 'Municipal corporations are political subdivisions of the state created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them . . . the number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter

and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens or even against their protest. In all these respects the state is supreme, and its legislative body conforming its action to the state Constitution, may do as it will, unrestrained by any provisions of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.' " 94 Ill. App. 2d 265, 268-69.

In *Town of Godfrey v. City of Alton* (1975), 33 Ill. App. 3d 978, this court held that the consent requirement of section 2-3-5a was a valid exercise of the State's police powers, and that as such it was not an unlawful delegation of legislative authority, was not without adequate standards and guidelines, was not in violation of the constitutional prohibition against laws granting special privileges and immunities, and was not in violation of the constitutional prohibition against the passage of special or local laws. However, the issues of equal protection and due process were not raised in that case.

Nonetheless, we conclude that no violation of equal protection or substantive due process has occurred here because there has been no infringement of a fundamental right. This is not a case involving the gerrymandering of political districts so as to discriminate against a certain class of voters such as was the case in *Gomillion v. Lightfoot* (1960), 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125,

but rather the location of a new municipality, the control over which is firmly within the hands of the legislature. (See *People ex rel. Landwer v. Village of North Barrington* (1968), 94 Ill. App. 2d 265.) In comparison, we note that our supreme court has consistently taken the same position with respect to other municipal corporations, most notably school districts. In *Board of Education v. Special Charter School District No. 61* (1965), 32 Ill. 2d 342, 344, our supreme court stated, "[t]hese are no longer fairly debatable constitutional questions." Contra *Mid-County Future Alternatives Committee v. Metropolitan Area Local Government Boundary Com.* (1986), 82 Ore. App. 193, 728 P.2d 63; *City of Seattle v. State of Washington* (1985), 103 Wash. 2d 663, 694 P.2d 641.

There being no infringement of a fundamental right, the State need show only a rational relationship to a legitimate State purpose rather than a compelling State interest. We observe that plaintiffs have not contended that the legislation in question bears no reasonable relationship to a legitimate State purpose.

Finally, the plaintiffs contend that section 2-3-5a denies procedural due process in that it neither provides standards for making a decision nor provides for a hearing prior to making the decision whether to grant or deny consent to the incorporation.

The basic requirements of procedural due process are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. (*In re Marriage of Mierlak* (1981), 100 Ill. App. 3d 228.) When considering whether a statute violates due process in exercising police powers of the State, the standard is

whether the statute is reasonably designed to remedy ills which the legislature has determined to be a threat to public health, safety, and general welfare. *People v. Wick* (1984), 121 Ill. App. 3d 94, *aff'd* (1985), 107 Ill. 2d 62.

Plaintiffs argue that the right to elective franchise is a fundamental right, and that therefore they are entitled to a hearing before that right can be impaired. (*Board of Regents v. Roth* (1972), 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701.) While section 2-3-5a does require a hearing on the question of whether the statutory criteria have been met, plaintiffs argue that such a hearing is insufficient because the consent requirement is not in issue at the hearing.

We have previously determined in this case that the right to an elective franchise is not involved in this case, but rather the prerogative of the State to establish municipal boundaries. Thus no fundamental right is in danger of impairment which would trigger the need for a hearing on the issue of the consents of the surrounding municipalities. Therefore, we hold that no violation of the plaintiffs rights to procedural due process occurred.

The judgment of the circuit court of Lake County is affirmed.

Affirmed.

LINDBERG, P.J., and HOPF, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court,) ss.
Second District,)

I, LOREN J. STROTZ, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.*

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 12 day of August, A.D., 1987.
Clerk Appellate Court, Second District

/s/ Loren J. Strotz,

APPENDIX B

Office of the Clerk
312-695-3750

State of Illinois
Appellate Court Second District
Elgin
60120

Appeal from the Circuit Court of County of Lake

Trial Court Number: 86CH193

THE COURT HAS THIS DAY, 11/03/87, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-86-0568

Kaltsas, John L., etc v. City of No. Chicago etc.

Motion by Appellants to recall the mandate heretofore issued and to stay mandate pending filing petition and disposition for leave to appeal to the Supreme Court of Illinois.
Motion Allowed.

LOREN J. STROTZ, Clerk

cc: Siemon, Larsen, Mattlin & Purdy
William W. Merrill, III
Gerald P. Callaghan
Charles L. Siemon
Wendy U. Larsen
Conzelman, Schultz, Snarski & Mullen
Murray R. Conzelman
Thomas H. Compere
John E. Schultz
Rosing, Applehans & Smith, Ltd.
William G. Rosing
Lonchar & Nordigian
Peter J. Nordigian
Julius Abler, Esq.
Fred Weiszmann
Overholser, Flannery, Hoover & Boyd
Michael J. Boyd
Hon. Sally D. Coffelt

APPENDIX C

Office of the Clerk
312-695-3750

State of Illinois
Appellate Court Second District
Elgin
60120

Appeal from the Circuit Court of County of Lake

Trial Court Number: 86CH193

THE COURT HAS THIS DAY, 10/07/87, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-86-0568

Kaltsas, John L., etc v. City of No. Chicago etc.

Petition by Plaintiffs-Appellants for rehearing or in the alternative for Certificate of Importance, denied.

LOREN J. STROTZ, Clerk

cc: Siemon, Larsen, Mattlin & Purdy
William W. Merrill, III
Gerald P. Callaghan
Charles L. Siemon
Wendy U. Larsen
Conzelman, Schultz, Snarski & Mullen
Murray R. Conzelman
Thomas H. Compere
John E. Schultz
Rosing, Applehans & Smith, Ltd.
William G. Rosing
Lonchar & Nordigian
Peter J. Nordigian

Overholser, Flannery, Hoover & Boyd
Michael J. Boyd

APPENDIX D

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

John L. Kaltsas, et al.	)	
	)	
Plaintiffs,	)	
	)	GEN. NO.
vs.	)	86 CH 193
	)	
City of North Chicago, et al.	)	
	)	
Defendants.	)	

ORDER

On motion of The Village of Lake Bluff, The City of Lake Forest and other Defendants to strike and dismiss the complaint herein, the cause being submitted on briefs and oral arguments and Plaintiffs' seeking to file a supplemental brief, and the court having considered said motions, briefs and oral arguments.

It is hereby ordered that leave to file a supplemental brief be and the same is granted.

It is further ordered that this cause be and the same is hereby dismissed with prejudice. This is a final and appealable order.

ENTER:

/s/ John L. Hughes
Judge

Dated at Waukegan, Illinois this
5th day of June 1986.
Prepared by Peter J. Nordigian

APPENDIX E

66175

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 3, 1988

Siemon, Larsen, Mattlin & Purdy
Attorneys at Law
47 W. Polk St. (Dearborn Station)
Chicago, IL 60605-2030

No. 66175—John L. Kaltsas, et al., petitioners, v. City of North Chicago, et al., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1988.

APPENDIX F

No. 66175

IN THE
SUPREME COURT OF ILLINOIS

John L. Kaltsas, et al.,

Petitioners,

v.

City of North Chicago, et al.,

Respondents.

Appeal from
Appellate Court
Second District
AC2-86-0568

ORDER

(Filed February 29, 1988)

This matter has come for consideration upon the motion of petitioners to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such

affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Thomas Moran
Justice, Supreme Court of Illinois

APPENDIX G

No. 02-86-568

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE SECOND DISTRICT

JOHN L. KALTSAS, FRED ENGBRECHT, DIANA ENGBRECHT, BRUCE L. FELKNOR, EDITH J. FELKNOR, JAMES E. WARD, DONNA R. WARD, KEVIN CALAHAN, and GABRIELLE CALAHAN,	)	Notice of Appeal to the Supreme Court of the United States
Plaintiffs-Appellants,	)	———
vs.	)	On Appeal from the Circuit Court
CITY OF NORTH CHICAGO, CITY OF LAKE FOREST, CITY OF WAUKEGAN, VILLAGE OF LAKE BLUFF, VILLAGE OF LIBERTYVILLE, VILLAGE OF GREEN OAKS and VILLAGE OF METTAWA,	)	of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 86 CH 193
Defendants-Appellees.	)	

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

(Filed April 26, 1988)

Notice is hereby given that John L. Kaltsas, Fred Engbrecht, Diana Engbrecht, Bruce L. Felknor, Edith J. Felknor, James E. Ward, Donna R. Ward, Kevin Calahan and Gabrielle Calahan, Plaintiffs-Appellants above named,

hereby appeal from the final judgment of the Appellate Court of Illinois, affirming dismissal of the Complaint, entered in this action on August 12, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

SIEMON, LARSEN & PURDY
Charles L. Siemon
Wendy U. Larsen
Gerald P. Callaghan
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47 West Polk Street
Chicago, Illinois 60605-2030
(312) 939-7117

By /s/ Gerald P. Callaghan
Counsel for Appellants

PROOF OF SERVICE

I hereby certify that on this 25th day of April, 1988, copies of the foregoing Notice of Appeal to the United States Supreme Court were mailed, postage prepaid, to each of the attorneys listed on the attached service list. I further certify that all parties required to be served have been served.

By /s/ Gerald P. Callaghan
Gerald P. Callaghan

(Service List omitted in Printing)

APPENDIX H

Illinois Municipal Code, Ill. Rev. Stat. ch. 24, ¶ 2-3-5a (1985):

§ 2-3-5a. Whenever in any county of 150,000 or more population as determined by the last preceding federal census any area of contiguous territory contains at least 4 square miles and 2500 inhabitants residing in permanent dwellings, that area may be incorporated as a village if a petition filed by 250 electors residing within that area is filed with the circuit clerk of the county in which such area is located addressed to the circuit court for that county. The petition must set forth:

(a) a legal description of the area intended to be included in the proposed village,
(b) the number of residents in that area,
(c) the name of the proposed village, and
(d) a prayer that the question of the incorporation of the area as a village be submitted to the electors residing within the limits of the proposed village.

If the area contains fewer than 7,500 residents and lies within 1½ miles of the limits of any existing municipality, the consent of that municipality must be obtained before the area may be incorporated.

Illinois Municipal Code, Ill. Rev. Stat. ch. 24. ¶ 2-3-6 (1985):

§ 2-3-6. Upon the filing of such a petition with the circuit clerk, the court shall hear testimony and rule that the area under consideration is or is not a village in fact. The ruling of the court shall be entered of record in the court. If the court rules that the area does not constitute a village in fact, the petition to incorporate the area as a village is denied and no subsequent petition concerning village incorporation of any of the land described in the earlier petition may be filed within one year. If the court rules that the area does constitute a village in fact, such court shall enter an order so finding and the proposition shall be certified and submitted to the electors of such

area in the manner provided by the general election law. The proposition shall be in substantially the following form:

> Shall the territory (here describe it) be incorporated as a village under the general law?

The result of the election shall be entered of record in the court. If a majority of the votes cast at the election favor incorporation as a village under the general law the inhabitants of the territory described in the petition are incorporated as a village under this Code with the name stated in the petition.

Illinois Municipal Code, Ill. Rev. Stat. ch. 24, ¶ 2-3-18 (1985):

§ 2-3-18. In any county of between 150,000 and 1,000,000 population which has adopted an official plan under "An Act to provide for regional planning and for the creation, organization and powers of regional planning commissions", approved June 25, 1929, as amended, the county board, by resolution, may provide that before the question of incorporating a village under this Division is submitted to the electors in response to a petition filed under Section 2-3-5 or 2-3-10 the county board must first determine that (1) the proposed incorporation is compatible with the official plan for the development of the county, and (2) the lands described in the petition as intended to be embraced in the village constitute a sufficient tax base as will insure the ability of the village to provide all necessary municipal services to its inhabitants. When such a resolution is in effect, the court in which such a petition is filed shall first require a showing that those determinations have been made by the county board. If no such showing is made, the court shall deny the petition. If such a showing is made, the court shall proceed as provided in Section 2-3-6 or 2-3-11, as the case may be.

(2)

No. 87-1842

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN L. KALTSAS, et al.,

Appellants,

v.

CITY OF NORTH CHICAGO, et al.,

Appellees.

On Appeal From The Appellate Court
Of Illinois For The Second District

MOTION TO DISMISS

MURRAY ROSS CONZELMAN *
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(312) 623-0112

Counsel for Certain Appellees

* Counsel of Record

July 23, 1988

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

LIST OF PARTIES

The parties to this Motion To Dismiss are listed as follows:

CITY OF LAKE FOREST represented by MURRAY ROSS CONZELMAN

CITY OF NORTH CHICAGO represented by WILLIAM G. ROSING

VILLAGE OF LAKE BLUFF represented by PETER J. NORDIGIAN

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No. 87-1842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN L. KALTSAS, et al.,

Appellants,

v.

CITY OF NORTH CHICAGO, et al.,

Appellees.

On Appeal From The Appellate Court
Of Illinois For The Second District

MOTION TO DISMISS

These Appellees move to dismiss upon the following grounds:

I.

THE OPINION BELOW IS BASED ON LONG-STANDING AUTHORITY

The decision below was not novel. It is based on the decision of this Court in the case of *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), where this Court said at pages 178-179:

"This Court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors. . . We think the following principles have been established by them and have become settled doctrines of this Court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State that may be intrusted to them . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protests. In all these respects the State is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States . . . The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

II.

STATE AUTHORITY IS ABSOLUTE

Illinois Courts have consistently followed the authority set forth above.

For example, in the case of *Spaulding School District v. City of Waukegan*, 18 Ill. 2d 526 (1960), the Illinois Supreme Court said at page 528:

> "At the outset we must recognize that the Legislature, and it alone, has the power to permit or require the alteration of municipal boundaries by annexation or otherwise."

The Appellate Court for the Second District of Illinois, which is the Court which rendered the decision below, reached the same conclusion in the case of *People Ex Rel. Landwer v. Village of North Barrington*, 94 Ill. App. 2d 265, 237 N.E.2d 350 (1968). In that case the Court said at page 352 of 237 N.E.2d:

> "It is fundamental that municipalities are creatures of the Legislature and entirely subject to the legislative will."

At page 354 of 237 N.E.2d the Court said:

> "Municipalities are mere creatures of the Legislature, created for convenience in the handling of day to day local problems. The Legislature has complete authority over them and may change them from time to time; it may expand, contract or even abolish them, with or without notice, consent, and even against the protests of persons interested in the matter, all without transgressing any constitutional provisions."

The only exception to this rule is found in the case of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In that case this Court held that municipal boundaries cannot be used to abridge a "federally protected right". The facts of that case were that an Alabama law authorized the changing of city boundaries and in that case disenfranchised all but four or five of a city's four hundred black voters while not affecting a single white voter. It is small wonder that the Court held that law invalid. In the case at bar no such facts are alleged or involved and the decision simply does not apply to this case.

As a result the Legislature, and only the Legislature, decides the matter of municipal boundaries.

III.

SECTION 2-3-5a OF THE ILLINOIS MUNICIPAL CODE DOES ADVANCE A COMPELLING STATE INTEREST

Based upon the foregoing authorities it is apparent that the concept of "a compelling State interest" does not even arise since the Legislature, and only the Legislature, has authority over municipal boundaries.

If the concept of "a compelling State interest" does arise, then that concept fits directly into the framework of Illinois municipal law.

In the case of *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E.2d 890 (1975), the Appellate Court for the Fifth District of Illinois was concerned with the constitutionality of the very same statutory provisions that is involved in this case, namely Section 2-3-5a, Illinois Municipal Code. The Court held that the foregoing provision did not violate the Constitution. At page 893 of 338 N.E.2d the Court said:

> "The Statute in question . . . is one of numerous Statutes which enable a municipality to control the development of contiguous territory located within one and one-half miles of its corporate limits and not contained within any other municipality. The Legislature has seen fit to delegate to municipalities various powers over such contiguous territories including, for example, the power to zone. . . As early as 1921 the General Assembly provided for municipalities to establish a planning commission. . ."

At pages 894 and 895 N.E.2d the Court said:

> "The consent requirement of the challenged Statute is incidental to and is not independent of, the valid exercise of police power by municipalities within this State. In the absence of the consent requirement,

> contiguous areas would be free to incorporate up to the corporate limits of any existing municipality. The effect of incorporation of contiguous areas would be to nullify all of the validly enacted municipal ordinances affecting such areas, thus abrogating all the plans and regulations designed to promote the development of such areas. Our Legislature in an attempt to protect the police powers it delegated to the municipalities, provided that incorporation of contiguous areas be contingent upon the consent of the affected municipality. We do not find such requirement repugnant to either our Constitution or the United States Constitution. . . Rather, we find the consent requirement to be constitutionally permissible under the well recognized power of the State to control the formation of political subdivisions within its boundaries. . ."

In this case the nearby municipalities have planning jurisdiction within one and one-half miles of their limits and to protect this planning jurisdiction the Legislature has given them the power of consent over the incorporation of a new municipality within that area. This is consistent with the planning jurisdiction previously granted. The ability to control the planning and development of areas adjacent to an existing municipality is "a compelling State interest" since it is in furtherance of the plan of the State to provide existing municipalities with planning powers as well as other police powers to protect their established plans and the land around them.

IV.

MUNICIPAL POWER OVER ADJACENT TERRITORY IS NECESSARY

As indicated Illinois municipalities have planning and other police powers within one and a half miles of their boundaries and the validity of these provisions have been upheld against constitutional attack in the case of *Town*

of Godfrey v. City of Alton, 33 Ill. App. 3d 978, 338 N.E. 2d 890 (5th Dist. 1975).

Municipal boundaries are not stagnant and existing municipalities must have planning powers beyond their boundaries so that when those areas are subsequently annexed they will have been developed or will be developed in accordance with the plans of the existing municipality. A contrary rule would permit haphazard development surrounding municipalities and they would then face the dilemma of either annexing undesirable development or living side by side with it. Either alternative offers a poor result and the Illinois Legislature has wisely chosen to grant existing municipalities the power to plan and control areas within one and one-half miles of their boundaries so that as they expand they will absorb development over which they have had some authority and control.

With few exceptions the cases cited by the Appellants are cases which involve voting rights, that is to say, the right to vote for candidates, and based upon the foregoing that is a far different proposition from the right to vote on municipal boundaries, which is not a "right" and which does not exist.

For example, in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that two plans to apportion the Alabama House of Representatives were invalid because they were not based on population or any other rational basis. The plans dealt with direct voting for representatives and had nothing to do with municipal boundaries.

In the case of *Kramer v. Union Free School District*, 395 U.S. 621 (1969) this Court held invalid a New York Statute limiting voting in school elections to voters who either owned or leased real estate or had children in the school district. The case involved a traditional right to

vote and the question of municipal boundaries was not involved.

In *Moore v. Ogilvie*, 394 U.S. 814 (1969), this Court held invalid a Statute that required election Petitions to have twenty five thousand signatures, including two hundred from each of fifty counties. The Court held that the Statute was invalid because it favored voters in certain counties as against voters who lived in other counties. This case had to with voting for representatives and had nothing to do with municipal boundaries.

In the case of *Communist Party of Illinois v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975), an Illinois Statute requiring Petitions to have at least twenty five thousand signatures with no more than thirteen thousand from one county was also held invalid. Again the question of municipal boundaries was not involved.

A case cited by Appellants but favoring the Appellees is *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). There this Court held that the residents of a small rural community on the outskirts of Tuscaloosa did not have a constitutional right to vote in city elections even though they were subject to the city's extra territorial powers. This Court said at page 71:

> "Government . . . 'is the science of experiment' . . . and a State is afforded wide leeway when experimenting with the appropriate allocation of State legislative power."

At pages 73 and 74 this Court said:

> ". . . this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the State Legislature, and Alabama citizens are free to urge their proposals to that body."

At page 75 this Court said:

> "Alabama is apparently content with the results of its experiment, and nothing in the equal protection clause of the Fourteenth Amendment requires that it try something new."

The simple answer is that the right to determine municipal boundaries is vested in the Legislature. It is not a "constitutional right" and it is not a "federally protected right".

V.

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

This problem is not unique to Illinois. All over the United States cities and villages risk being surrounded by adverse and unplanned development. That development has an adverse impact on them whether they subsequently annex the property or not.

Illinois has seen fit to address this problem by granting municipalities extra-territorial powers over planning, development and incorporation. Illinois is apparently satisfied with this solution as evidenced by the opinion below and the other Illinois cases cited above. Indeed, the decision in *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E.2d 890 (5th Dist. 1975), cited above, explains this rationale for the Illinois rule.

Other states have taken different approaches such as that set forth in Alabama and discussed by this Court in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) cited above.

The point is that the Constitution does not require states to take one particular approach and there is no need for a federal solution to this problem.

This problem should be left to the states where it has resided for many years.

If this were not already the law we would urge the Court to adopt it. Since it is and has been the law we urge the Court to adhere to it and find no substantial federal question.

CONCLUSION

For the reasons set forth above these Appellees respectfully move that this Court dismiss the Petition On Appeal filed herein.

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No. 87-1842

In The

Supreme Court of the United States

October Term, 1987

JOHN L. KALTSAS, et al.,

Appellants,

v.

CITY OF NORTH CHICAGO, et al.,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE SECOND DISTRICT

BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

The argument that Appellees advance to support their Motion to Dismiss has three basic elements. First, they claim that State authority governing municipal incorporation is not subject to the protections set forth in the Fourteenth Amendment of the United States Constitution. This argument is repugnant to the notion that the United States Constitution is the supreme law of the land. *See* U.S. Const. art. VI. Second, they claim that this case does not involve voting rights. This argument is contrary to established precedent. Third, the Appellees argue that the municipal consent provision of Ill. Rev. Stat. ch. 24, ¶2-3-5a, which applies to unincorporated areas with a population of 2,500 to 7,500 but not to unincorporated areas with a population over 7,500, is necessary to advance a compelling state interest. This argument, however, fails in light of other principles in the law of Illinois governing municipalities. As Appellants explain more fully below, this Court should deny Appellees' Motion to Dismiss.

I.
STATE AUTHORITY IS NOT ABSOLUTE.

In *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960), this Court held that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." Appellees, however, cling tenaciously to the notion that this Court's decision in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), automatically insulates any State legislation governing municipal incorporation from the United States Constitution. This Court explained in *Gomillion*, 364 U.S. at 342-44, that such a broad interpretation misconceives the reach of *Hunter*. In many instances, discussed *infra*, this Court and other courts have invalidated state laws governing municipal affairs for violating the Fourteenth Amendment.

Appellees also misstate the law in asserting that the *only* exception to the rule they purport to descend from *Hunter* is the racial discrimination this Court faced in

Gomillion v. Lightfoot. Appellees fail to address decisions of this Court and other courts which do not involve racial discrimination and which hold that the exercise of State power over municipal affairs must conform to the United States Constitution. *See, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). These include decisions invalidating statutes governing changes in municipal boundaries through incorporation or annexation. *See Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978) (annexation); *Curtis v. Board of Supervisors of Los Angeles County*, 7 Cal.3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 (1972) (incorporation); *City of Seattle v. State*, 103 Wash.2d 663, 694 P.2d 641 (1985) (annexation); *Mayor and Council of City of Dover v. Kelley*, 327 A.2d 748 (Del. 1974) (annexation). Appellees' claim that State authority in this area is supreme therefore is erroneous and should not be a basis for dismissing this appeal.[1]

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[1] To support their position, Appellees cite two decisions from Illinois courts for the premise that Illinois courts have consistently followed the principle which Appellees purport to descend from *Hunter v. City of Pittsburgh*. *See* Motion to Dismiss at 2-3. However, the language they quote from *Spaulding School District v. City of Waukegan*, 18 Ill.2d 526, 165 N.E.2d 283, 285 (1960), is out of context. The court in that case was explaining that its role was merely to construe a statute adopted by the legislature; no constitutional questions were raised or decided. The decision does not even mention *Hunter* or any other decision of this Court. In *People ex rel. Landwer v. Village of North Barrington*, the court recognized that the legislature could not use "its power over municipal boundaries to circumvent a Federally-protected right, *such as* . . . the case in *Gomillion*". 94 Ill. App. 2d 265, 237 N.E.2d 350, 353 (1968) (emphasis added). The decision creates no impression that racial discrimination is the only exception to *Hunter*. Nor did *Landwer* involve a denial of voting rights or equal protection. It is therefore apparent that the courts of Illinois have never applied *Hunter* in the manner Appellees claim.

II.
THIS CASE INVOLVES A FUNDAMENTAL RIGHT TO VOTE.

Appellees' Motion to Dismiss erroneously tries to restrict constitutional protection of voting rights to cases where a right to vote for candidates is involved. *See* Motion to Dismiss at 6-7. Appellees fail to address numerous cases, which did not involve voting for candidates, in which this Court and other courts have recognized a constitutionally-protected right to vote on other municipal matters. *See, e.g., Cipriano v. City of Houma*, 395 U.S. 701 (1969) (revenue bond question); *Hill v. Stone*, 421 U.S. 289 (1975) (general obligation bond question). *See also St. Louis County, Mo. v. City of Town and Country*, 590 F. Supp. 731, 736 (E.D. Mo. 1984) (recognizing annexation voting rights claims as justiciable).

Established precedent recognizes and protects a right to vote on municipal boundary questions. Once the legislature places the final decision on incorporation or annexation in the hands of the voters in the unincorporated area, those persons have a right to vote which is protected by the constitutional principles governing elections. *Mayor and Council of City of Dover v. Kelley*, 327 A.2d at 754; *Curtis v. Board of Supervisors*, 501 P.2d at 545; *Hayward v. Clay*, 573 F.2d at 188-90; *City of Seattle v. State of Washington*, 694 P.2d at 646-47. In all of these cases, the courts found that voting rights existed and held that the impediments which the statutes placed on the exercise of those rights were repugnant to the Fourteenth Amendment.[2]

The Illinois legislature has created a right to vote for incorporation. The Municipal Code provides that villages

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[2] This Court itself has applied such principles. For example, in *Hadley v. Junior College District*, 397 U.S. 50, 59 (1970), this Court applied the "one-man, one-vote" rule to an elected school board and invalidated a statutory formula for selecting college trustees, even though in a prior case, *Sailors v. Board of Education*, 387 U.S. 105, 108 (1967), it recognized that school boards need not be elected.

may only be incorporated by election, and that such an election is the final decision regarding whether the area will be incorporated. Ill. Rev. Stat. ch. 24, ¶2-3-6 (1985). *See* Jurisdictional Statement at 11 n.2. The legislature has therefore granted to residents of unincorporated areas the right to vote on incorporation.[3] As in *Curtis, Hayward,* and *City of Seattle,* the Illinois statute allows someone else, the officials of nearby municipalities, to block such an election. In *Hayward v. Clay,* the Equal Protection Clause protected the right of residents of unincorporated areas to vote on annexation (that is, whether to incorporate an unincorporated area into an existing municipality) unburdened by a "condition precedent", 573 F.2d at 189, that property owners consent to the annexation. In the present case, Appellants seek to establish that the Fourteenth Amendment protects their right to vote on incorporation unburdened by a condition precedent that nearby municipalities consent to the incorporation.

The only case which Appellees cite to support their contention that voting rights are not at stake in the present case is *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978), which is inapposite. In *Holt Civic Club,* 439 U.S. at 70, this Court found that no right to vote for municipal officials existed, and therefore judged the statute against the less-stringent "rational relationship" test. That decision did not address a situation where the right to vote for municipal incorporation was burdened for residents of some unincorporated areas but not for residents of

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[3] Because the Illinois legislature has provided for elections as the only way to incorporate a village, the present case is different from the situations addressed in *Carlyn v. City of Akron,* 726 F.2d 287 (6th Cir. 1984), *Goodyear Farms v. City of Avondale,* 148 Ariz. 216, 714 P.2d 386, *appeal dismissed* 447 U.S. 906 (1986), and *Berry v. Bourne,* 588 F.2d 422 (4th Cir. 1978). In each of these cases, the statutes at issue placed the final decision in the hands of a body other than the voters in the unincorporated area, and did not rely on elections to make the decisions.

other unincorporated areas. The issue was whether residents of *any* unincorporated area located within a municipality's extraterritorial jurisdiction had the right to vote for the municipality's officials. The Court held that no voting right existed in such a situation because the persons who wanted to vote were not "physically resident within the geographic boundaries of the government entity concerned." 439 U.S. at 68. In the present case, the entity concerned is the unincorporated area which Appellants seek to incorporate, within which Appellants *are* physically resident. Appellants do not seek to vote for the officials of the municipalities, who are not residents of the area concerned but who can refuse to consent to the incorporation. Rather, Appellants wish to exercise their right to hold an election on whether to incorporate a new village, with their own elected officials to govern their own affairs, to the same extent that residents of unincorporated areas with larger populations may hold such an election.

Established precedent recognizes that once the State legislature grants a right to vote on some matter, the United States Constitution prohibits the State from placing discriminatory burdens on that right, unless necessary to further a compelling state interest. Nevertheless, the court below ignored this precedent and held that this case involves no infringement of a fundamental right. Because the decision below directly conflicts with relevant precedent, appeal to this Court is warranted to determine whether the Fourteenth Amendment recognizes and protects Appellants' right to vote for incorporation to the same extent as residents of more-populated unincorporated areas in Illinois.

III.
THE MUNICIPAL CONSENT PROVISION IS NOT NECESSARY TO ADVANCE A COMPELLING STATE INTEREST.

In the court below, Appellees proffered only an interest the State may have in ensuring that an area proposed for incorporation has the fiscal capacity to provide services. *See Kaltsas v. City of North Chicago*, 160 Ill. App. 3d

302, 513 N.E.2d 438, 441 (1987).[4] Appellees now claim that the consent provision helps existing municipalities retain some measure of control over development outside their boundaries. A number of principles in the law of Illinois, however, demonstrate that a municipality's interest in development beyond its borders is not compelling enough to justify discriminatory infringement of fundamental voting rights, and that the consent provision is not necessary to advance this interest.[5]

First, the consent provision does not apply to *all* unincorporated areas within one and one-half miles of an existing municipality. Development in unincorporated areas with populations greater than 7,500, given the number of people involved, could be expected to have an even greater impact on nearby municipalities than development in unincorporated areas with populations between 2,500 and 7,500. However, the consent provision

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[4] Appellants addressed this interest at pages 23 to 26 of the Jurisdictional Statement.

[5] Appellees erroneously claim that the decision in *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E.2d 890 (1975), demonstrates that a municipality's interest in planning for development beyond its borders is a compelling state interest necessitating the municipal consent provision in Section 2-3-5a. In that decision, however, the court did not have before it an equal protection or due process claim. Its ruling addressed the questions of separation of powers and privileges and immunities, and therefore lacks precedential value in determining whether a particular government interest is compelling enough to justify infringement of a federally-protected right. *See McNellis v. Combustion Engineers, Inc.*, 13 Ill. App. 3d 733, 301 N.E.2d 96, 100 (1973) (decision sustaining constitutionality of statute is not decisive of its validity against subsequent attacks on different grounds). The court did not determine whether a municipality's interest in promoting uniform development and perpetuating its existing plans and regulations for the development of areas outside its boundaries are so compelling as to justify infringement of the voting rights of persons living in the unincorporated area.

does not apply to unincorporated areas with larger populations. If the legislature views the interest municipalities have in development outside their boundaries as compelling and the consent provision as necessary to advance such an interest, then it would apply that provision across the board.

Second, the consent provision applies to *any* municipality within one and one-half miles of the area seeking to incorporate, and not only to those municipalities which have planning jurisdiction over the area. Illinois grants such jurisdiction only over *contiguous* unincorporated areas within one and one-half miles of the municipal boundaries. Ill. Rev. Stat. ch. 24, ¶11-12-5(1) (1985). Section 2-3-5a contains no such contiguity requirement. It therefore grants a veto power over the election to municipalities that are not contiguous to the area to be incorporated, have no planning jurisdiction over the unincorporated area, and therefore have no such interest to protect in blocking incorporation of the area.[6]

Third, Illinois law precludes a municipality from blocking, in the interest of retaining extraterritorial jurisdiction, the annexation of adjacent unincorporated lands by another municipality. A *quo warranto* action is the only method of attacking the validity of an annexation in Illinois. *Schallau v. City of Northlake,* 82 Ill. App. 3d 456, 403 N.E.2d 266, 271 (1980). A municipality cannot bring a *quo warranto* action challenging an annexation by another municipality where its interest is limited to planning and zoning for adjacent territory outside of its boundaries. *People ex rel. Brooks v. Village of Lisle,* 24 Ill. App. 2d 432, 321 N.E.2d 65, 68 (1974). Annexation results in the incorporation of an unincorporated area and has the same consequences for another municipality as the basic incorporation of the area into its own municipality.

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[6] Such is the case with Appellee Village of Libertyville, which is physically separated by Appellees Village of Mettawa and Village of Green Oaks from the area Appellants seek to incorporate. *See* Appendix (Exhibit B to Complaint).

The result is the removal of the unincorporated area from the extraterritorial planning jurisdiction of the other municipality. *See* Ill. Rev. Stat. ch. 24, ¶11-12-5(1) (1985). Illinois law therefore does not recognize any interest the other municipality may have in the development of nearby unincorporated lands as compelling enough to block annexation or incorporation of those lands.

Fourth, the fact that the legislature has chosen to grant none of the Appellees zoning authority over the lands which Appellants seek to incorporate further indicates that Appellees have no compelling interest in planning for development outside their boundaries. Illinois does not grant municipalities the power to zone unincorporated lands where the County has a zoning ordinance applying to those lands. Ill. Rev. Stat. ch. 24, ¶11-13-1 (1985). The zoning ordinance of Lake County, Illinois, applies to all unincorporated lands in the County and, therefore, to the lands Appellants seek to incorporate. County of Lake, Ill., Lake County Zoning Ordinance art. II (1984).

Fifth, any concern Appellees may have for coordinated development of the area is adequately covered by another provision of the Municipal Code, which requires the County board to determine whether "the proposed incorporation is compatible with the official plan of development of the county". *See* Ill. Rev. Stat. ch. 24, ¶2-3-18 (1985). Lake County, which contains the area Appellants seek to incorporate, has a population of 451,594. Bureau of Census, U.S. Dep't of Commerce, Series P-26, No. 82-13-SC, *Local Population Estimates* (1984). The County therefore has authority to adopt an official plan and establish design standards for subdivisions, public streets, and other land improvements. Ill. Rev. Stat. ch. 34, ¶3006 (1985). In preparing such a plan, the County must encourage municipalities to cooperate in order to coordinate municipal plans with County plans. Ill. Rev. Stat. ch. 34, ¶3005 (1985). Because the County has its own plan which is coordinated with municipal plans for the area, the determination to be made by the County board under Section 2-3-18 suffices

to protect a nearby municipality's interest in coordinated development in unincorporated areas.

Finally, if an existing municipality is harmed by the land use decisions made by a new municipality located within its former extraterritorial planning jurisdiction, then Illinois law gives the existing municipality standing to challenge such decisions made by the new municipality. *See Village of Barrington Hills v. Village of Hoffman Estates*, 81 Ill.2d 392, 410 N.E.2d 37 (1980). Because there exists an alternative means of protecting an existing municipality's interest in land use decisions for territory outside its boundaries, the consent provision is not necessary to protect that interest.

All of the above factors show that the interest alleged by Appellees is not compelling, and that the municipal consent provision is not necessary to advance such an interest. Even if this Court were to find that the Appellants have no right to vote for incorporation, and therefore judged the municipal consent provision according to the "reasonable relationship" test for equal protection and due process, the above factors indicate that the consent provision does not meet even the lower level of scrutiny. Granting appeal of this case therefore is warranted.

IV.
CONCLUSION

Appellees show no respect for the United States Constitution. At the conclusion of their Motion to Dismiss, Appellees state that "the Constitution does not require the states to take one particular approach and there is no need for a federal solution to this problem." Motion to Dismiss at 8. The Fourteenth Amendment of the Constitution, however, does require the states to take a particular approach; that approach is to not deny due process and equal protection under the law. Because it burdens the right to vote of residents of some unincorporated areas but not the right of residents of other unincorporated areas, the municipal consent provision of Section 2-3-5a,

as it has been exercised by Appellees, violates the Fourteenth Amendment. Because the decision below implicates a fundamental right and contradicts relevant decisions by this Court and other courts, a substantial federal question exists and Appellants respectfully request this Court to deny Appellees' Motion to Dismiss and note probable jurisdiction of this appeal.

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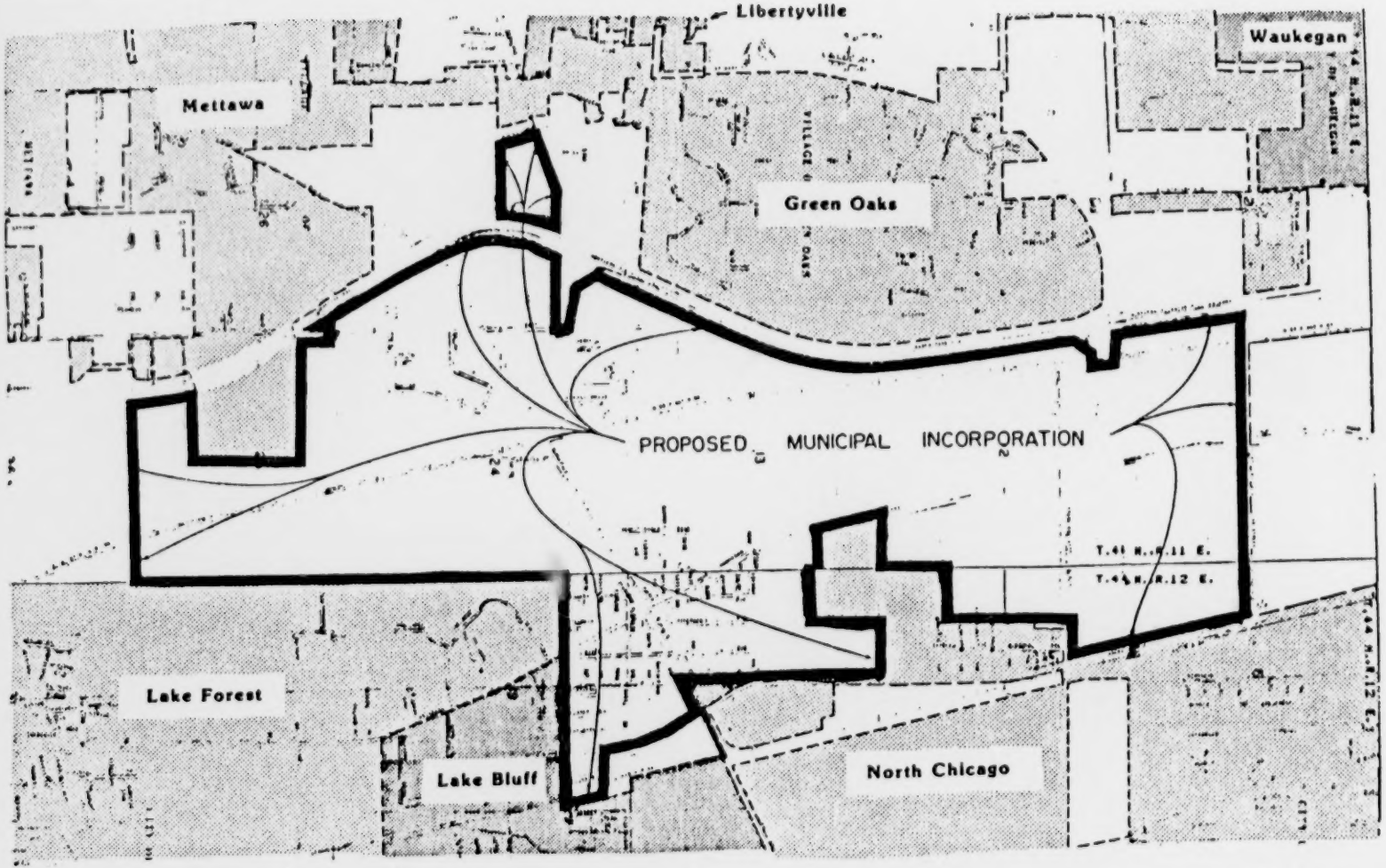
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PROPOSED MUNICIPAL INCORPORATION
T.41 N., R.11 E.
T.44 N., R.12 E.
Lake Forest
Lake Bluff
North Chicago
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Exhibit B